

FILED BY CLERK

APR 24 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0013-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JULIO CESAR TAPIA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20010642

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Julio Cesar Tapia

Buckeye
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Julio Tapia was convicted after a jury trial of second-degree murder. We affirmed the conviction and the presumptive, sixteen-year prison term on appeal, but vacated an erroneously imposed fee. *State v. Tapia*, No. 2 CA-CR 2001-0531

(memorandum decision filed Apr. 24, 2003). Tapia then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court denied the petition, and although we granted Tapia's petition for review, we denied relief. *State v. Tapia*, No. 2 CA-CR 2005-0407-PR (memorandum decision filed Sept. 15, 2006). In November 2011, Tapia filed what appears to have been his second notice of post-conviction relief. The trial court dismissed the notice summarily and this petition for review followed.

¶2 As the trial court correctly noted in its minute entry, Tapia had stated in his notice he intended to claim he had been “sentenced by [the] Juvenile Parole Board for 2nd Degree Murder” for the same offense, which had resulted in a violation of his double jeopardy rights, characterizing this claim as one based on newly discovered evidence. As the court also pointed out, Tapia intended to assert trial counsel had been ineffective for failing to raise this issue before trial. The court concluded the double-jeopardy claim was not cognizable under Rule 32.1(e). The court reasoned that any juvenile proceeding could not have been newly discovered, presumably because Tapia had to have known about a proceeding involving him. Based on its apparent review of juvenile records, the court found that, moreover, the juvenile proceeding to which Tapia had referred had not been based on the same offense that resulted in this conviction. Exercising its discretion pursuant to Rule 32.4(c)(2), the court refused Tapia's request for appointed counsel in his second post-conviction petition.

¶3 It is for the trial court to determine in the exercise of its discretion whether post-conviction relief is warranted and unless it abuses that discretion, we will not disturb its ruling. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). The record

before us establishes the court ruled correctly, and Tapia has not sustained his burden of establishing otherwise. A trial court may summarily dismiss a notice under certain circumstances, including when a successive notice attempts to raise a claim that does not fall within subsections (d), (e), (f), (g) or (h) of Rule 32.1, without specifically setting forth the reasons for not raising the claim in previous petitions. Ariz. R. Crim. P. 32.2. Given Tapia's description in the notice of the claims he intended to raise, we reject his argument on review that he should have been permitted to file a petition. That he is a layperson, "is not trained in the law," and did not recognize the claim until he obtained assistance from a fellow inmate does not, as he contends, render the double-jeopardy claim newly discovered for purposes of Rule 32.2(e). *See State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989) (describing elements of colorable claim of newly discovered evidence). *See also Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963) (parties who conduct cases in propria persona "are held to the same familiarity with required procedures and the same notice of statutes and local rules as would be attributed to a duly qualified member of the bar"). Additionally, although we have not been provided the juvenile court records, we presume any such records support the court's conclusion that the juvenile matter did not involve the same offense. *See State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993).

¶4 Any related but independent claim of ineffective assistance of counsel also was precluded; Tapia raised such claims in his first post-conviction proceeding. *See State v. Swoopes*, 216 Ariz. 390, ¶ 23, 166 P.3d 945, 952-53 (App. 2007) (defendant who raises claim of ineffective assistance of counsel in first post-conviction proceeding precluded

from raising same in successive post-conviction proceeding). And because he was represented by counsel in that proceeding, he cannot rely on his lack of legal knowledge to explain his failure to raise the claim in the first proceeding, an assertion we have rejected, in any event, as an unavailing attempt to characterize an untimely raised claim as newly discovered.

¶5 For the reasons stated, we grant the petition for review but relief is denied.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge